IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA Plaintiff, v. TYSON FOODS, INC., et al. Defendants.	))))))))))	Case No. 4:05-cv-00329-GKF-PJC

DEFENDANTS' REPLY IN SUPPORT OF JOINT MOTION IN LIMINE TO PRECLUDE OPINION TESTIMONY BY NON-RETAINED EXPERTS (DKT. NO. 2435)

Come now Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc. ("Defendants") and in support of their Joint Motion in Limine to Preclude Opinion Testimony by Non-Retained Experts (Dkt. No. 2435) ("Motion") state as follows.

I. Introduction

In their Motion, Defendants challenged the admissibility and relevance of opinion testimony that they anticipate will be offered during the trial of this matter by Plaintiffs' non-retained experts Mark Derichsweiler and Drs. Indrajeet Chaubey, Brian Haggard, and Tommy Daniel. This challenge is based upon Federal Rules of Evidence 403 and 702 and Federal Rule of Civil Procedure 26(a)(2)(B). Plaintiffs assert that Defendants' challenge is untimely and that they have developed a sufficient record regarding the qualifications of the non-retained experts and the factual bases for the opinions those experts offer. Plaintiffs further assert that they were not required to submit a Rule 26(a)(2)(B) report with respect to Dr. Chaubey, despite the fact that

he offers brand new opinions generated in consultation with Plaintiffs' counsel. Finally, Plaintiffs assert that none of the non-retained expert testimony is cumulative. Plaintiffs' responses provide no basis to deny Defendants' motion.

II. Argument

A. Defendants' Motion is Not Untimely

First, Plaintiffs contend that the Motion is an untimely *Daubert* motion. State's Response (Dkt. No. 2499) ("Resp."), p. 2-3, 14-15. This is incorrect. Although some of Defendants' arguments do invoke Federal Rule of Evidence 702, Defendants could not have made those arguments at the time for filing *Daubert* motions.

Defendants' motion does not challenge the non-retained experts' factual bases or qualifications, as would a *Daubert* motion, but rather the foundation laid during their depositions for admission of their testimony. As stated in the Motion, these objections are relevant only if Plaintiffs attempt to present these non-retained experts by deposition rather than calling them live at trial.[1]

Defendants have not sought the exclusion of Mr. Derichsweiler's opinion testimony based upon Rule 702. Instead, Defendants' challenge to Mr. Derichsweiler's opinion testimony is based solely upon the cumulative nature of the testimony under Federal Rule of Evidence 403,

[1] In their Response, Plaintiffs contend that they have designated Dr. Chaubey's deposition as a precaution but intend to call Dr. Chaubey to testify live if he is available. If Dr. Chaubey does appear at trial, Plaintiffs will have the opportunity, and are required, to establish that he possesses the requisite qualifications to support his expert opinions before those opinions are offered. If Dr. Chaubey does not appear at trial, Plaintiffs are limited to the foundations laid during his deposition, which are insufficient to qualify Dr. Chaubey as an expert in his field. Plaintiffs do not indicate that they intend to call either Dr. Haggard or Dr. Daniel to present live testimony during the trial. Thus, Plaintiffs must rely solely upon the foundations laid during the depositions of Drs. Haggard and Daniel to qualify them. As discussed in Defendants' Motion, the deposition transcripts of Drs. Haggard and Daniel fail to set forth the experience necessary to qualify either of them as an expert in each of the areas for which Plaintiffs solicit opinions.

which is most certainly an argument appropriately made through a pre-trial motion in limine. This argument also serves as a basis for the exclusion of the opinion testimony of Drs. Chaubey, Haggard, and Daniel, in addition to Defendants' Rule 702 arguments. Additionally, Defendants' objection that Dr. Chaubey's opinions were not properly disclosed is based upon Federal Rule of Civil Procedure 26(a)(2)(B), not Federal Rule 702. Plaintiffs' argument regarding the timeliness of Defendants' Motion clearly does not apply to these arguments.

Thus, Defendants' objections to these non-retained experts are not of a sort typically asserted through *Daubert* challenges. Therefore, Defendants' Motion is timely.

B. Plaintiffs' Non-Retained Experts Offer Opinion Testimony That Is Not Supported By the Required Factual Foundation

Plaintiffs admit that they failed to elicit the necessary foundation testimony for the opinions its non-retained experts wish to offer, arguing only that the factual basis is set forth in the papers to which the opinions relate. For example, with respect to Dr. Daniel, Defendants noted that Plaintiffs asked Dr. Daniel to confirm statements from a paper he wrote more than ten years ago without inquiring as to the methodology used to reach those conclusions or the factual basis supporting his conclusions. Motion, p. 13-14. Recognizing their failure to lay the necessary foundation in the record, Plaintiffs contend that this omission is acceptable because the methodology is described in the article itself, which is contained within the deposition record as an exhibit. Resp., p. 20. Similarly, Plaintiffs solicited the opinion from Dr. Chaubey that "[o]nce phosphorus is delivered in the streams, it eventually makes it way downstream" (Exh. 1 to Motion, Chaubey Dep., 69:15-22), without inquiring as to the basis for that opinion. Plaintiffs now assert that this opinion emanated from the final Illinois River mass balance report and that one can determine this from a simple contextual review of the deposition transcript. Resp., p. 21. Notwithstanding this *post hoc* rationalization, Plaintiffs do not contest that they failed to elicit

that connection during Dr. Chaubey's deposition. Nor, for that matter, does the referenced article establish any factual basis or source for the subject statement.

Neither Defendants nor the Court should be expected to guess at which facts or analysis in a particular article underlie an opinion contained in or simply derived from that article. Without testimony connecting those articles to the opinions offered, the Court cannot determine that the opinion is based on a sufficient factual foundation to pass muster under Federal Rule of Evidence 702.

C. Plaintiffs Cannot Establish that Their Non-Retained Experts Possess the Expertise Necessary to Support the Opinion Testimony They Offer

Plaintiffs maintain that despite their failure to adequately explore the experience and qualifications of Drs. Chaubey, Haggard, and Daniel during their depositions, they may nevertheless establish the necessary qualifications by offering hearsay evidence such as the curriculum vitae, "biosketches," and publication lists that it attached to the depositions.[2] But qualification is just one aspect of Federal Rule of Evidence 702, and is hardly dispositive of the reliability of an expert's opinions. *See* F.R.E. 702. Indeed, were qualifications alone sufficient, an expert with the appropriate academic background could share any opinion no matter how unreliable. The point of requiring the party tendering a witness to establish a foundation for the expert's qualifications is to ensure the reliability of opinions offered by the witness, not just to recite the witness's educational pedigree. *See Cook v. Rockwell Intern. Corp.*, 580 F.Supp.2d 1071, 1159-1160 (D.Colo. 2006) (stating that to the extent an expert relied upon his experience to reach his conclusions, "Rule 702 requires that he 'explain how that experience leads to the

[2] Plaintiffs assert that Defendants could have cross-examined Dr. Chaubey on the record as to his qualifications at his deposition. Resp., p. 16, However, it was not Defendants' burden to establish a foundation for the admission of Dr. Chaubey's undisclosed, expert opinions. That burden rests upon Plaintiffs, and Plaintiffs failed to meet it.

conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts"') (quoting *United States v. Fredette*, 315 F.2d 1235, 1240 (10th Cir. 2003)). Without questions connecting the experience reflected in the hearsay evidence to the opinions offered in this case, thus demonstrating the reliability of the methodology offered and demonstrating that the opinions connect to the facts and data at issue, the Court cannot determine that the non-retained expert is qualified to offer the opinions.

Plaintiffs address Defendants' challenge to Dr. Chaubey's opinions regarding "the transport of constituents of poultry litter" based upon "his research experience dealing with the transport of such constituents in 'small controlled plots'" by referring to a 2008 study by Dr. Chaubey in the Savoy Experimental Watershed in which Dr. Chaubey conducted a field scale runoff study under natural conditions.[3] Resp., p. 17. However, because it does not involve fields to which poultry litter has been land applied, this study does not provide Dr. Chaubey with the experience necessary to offer his opinions relating to alleged injuries to the IRW, which Plaintiffs claim are caused by the land application of poultry litter, any more than does Dr. Chaubey's work with small controlled plots. *See generally*, Exh. 8 to Resp.

Plaintiffs assert that Dr. Haggard's and Dr. Daniel's research experience qualifies them to offer expert opinion, citing to deposition testimony regarding three studies in which Dr. Haggard was involved and two studies in which Dr. Daniel was involved. Resp., p. 18-19. But these discussions do not establish a sufficient foundation for Dr. Haggard's or Dr. Daniel's expert testimony. Indeed, Defendants specifically identified three opinions offered during Dr. Haggard's deposition as examples of the types of opinion testimony being challenged. The three

[3] Plaintiffs do not address Defendants' challenge to Dr. Chaubey's qualifications to offer opinions relating to health hazards, buffer strips, limnology, microbiology, agronomy, agricultural economics, and fluvial geomorphology. Motion, p. 10.

studies that Plaintiffs now cite as research experience qualifying Dr. Haggard to offer those opinions were the source of and basis for the opinions elicited at his deposition.[4] *See* Exh. 1, Haggard Dep., 20:16-50:11; 51:7-60:8, 61:5-73:16. Similarly, with respect to Dr. Daniel, Plaintiffs admit that the opinions solicited are direct quotes from Dr. Daniel's papers. Resp., p. 19-20. Plaintiffs' reliance on these sources to bolster each witness's reliability is circular. Instead, Plaintiffs were obliged to establish a separate foundation demonstrating Dr. Haggard's and Dr. Daniel's qualifications to engage in this research and offer in the first instance the opinions now lifted from their articles.

D. The Opinions Offered by Plaintiffs' Non-Retained Experts Are Not Sufficiently Tied to the Facts of This Case

Defendants challenged the relevance and admissibility of opinion testimony based upon research conducted in watersheds other than the IRW. Plaintiffs allege that such research is relevant and that knowledge about "fundamental and universal scientific processes" can be transferred from one watershed to another watershed. Resp., p. 6. However, Plaintiffs ignore Dr. Chaubey's admission that "[a] general conclusion about behaviors across a watershed will give you an opinion about a particular process that may happen at a specific site" only where conditions are the same. Exh. 1 to Motion, Chaubey Dep., 247:14-24. To the extent that a non-retained expert offers opinions that truly relate to fundamental and universal scientific principles, Defendants do not dispute that those opinions are admissible for the limited purpose of educating

[4] Additionally, Dr. Haggard was not the primary author of two of the three studies to which Plaintiffs cite. Exh. 1, Haggard Dep., p. 20:16-21:1; 51:7-12. These two publications relate to the work of graduate students for whom Dr. Haggard served on master's thesis committees or who were housed in the graduate department where Dr. Haggard worked. *Id*. With respect to one of the studies, Dr. Haggard did no field work. *Id*. at 52:18-21. Because of Dr. Haggard's superficial involvement in the actual research and drafting of the articles, they should not serve as evidence of Dr. Haggard's experience sufficient to qualify him to offer the challenged opinions.

the factfinder. *See* Advisory Committee Notes, 2002 Amendment to Federal Rule of Evidence 702. However, to the extent that differences exist in conditions in the IRW and other watersheds that the non-retained expert has studied, those principles lose their fundamental and universal nature and are no longer admissible under Federal Rule of Evidence 702, as they are not sufficiently tied to the facts of the case at hand.

E. Opinions Offered by Dr. Chaubey That Were Not Disclosed Prior to this Litigation Are Barred Under Federal Rule of Civil Procedure 26

Plaintiffs are correct that typically non-retained experts are not required to submit a Rule 26 report. Dr. Chaubey, however, is not the typical non-retained expert. Where a non-retained expert seeks to offer opinions that were not disclosed in work completed prior to and unrelated to the litigation, those opinions should be set forth in a Rule 26(a)(2)(B) report. This is all the more true when the undisclosed expert has demonstrable ties to the party eliciting and offering those opinions, as is the case with Dr. Chaubey. Motion, p. 26-27.

Plaintiffs allege that Dr. Chaubey developed all of his opinions independent of this litigation. Resp., p. 11. However, during Dr. Chaubey's deposition, Plaintiffs' counsel elicited opinions from Dr. Chaubey that are not contained within Dr. Chaubey's prior publications. ***See*** Motion, Section II.A and p. 22. Because Defendants were not aware of these opinions prior to the deposition, Defendants were necessarily not prepared to explore those opinions and the bases for them during the deposition. That is exactly the situation that Rule 26 seeks to avoid by imposing a requirement that experts submit a report setting forth all of their opinions.

In *Griffith v. Northeast Illinois Regional Commuter Railroad Corp*., 233 F.R.D. 513, 518 (N.D. Ill. 2006), the court discussed the rationale behind Rule 26(a)(2)(B), stating that the rule was amended in 1993 to require the submission of a detailed expert report due to "dissatisfaction with 'sketchy and vague' expert disclosures." The Advisory Committee Notes to the 1993

Amendments to Rule 26(a)(2) state that "the report, which is intended to set forth the substance of the direct examination, should be written in a manner that reflects the testimony to be given by the witness and it must be signed by the witness." *Griffith* focused on opinion testimony offered by a treating physician regarding causation, prognosis, or future disability. 233 F.R.D. at 517. The court stated that "[w]hen a treating physician's testimony is limited to his observation, diagnosis and treatment, the medical records provide a significant amount of information about the physician's likely testimony. However, the medical records alone provide little or no information about any opinions the physician may render regarding what caused the injury, or whether the plaintiff will be unable to work in the future." *Id*. at 518. Specifically, in *Griffith*, the "treatment notes [did] not express the opinions that [the treating physician] gave in response to Griffith's attorney's questions." *Id*. Even though the treating physician's opinions on causation, prognosis, and future disability were derived from his observations of the patient, it was unfair to the other party for those opinions to be expressed without adequate opportunity to prepare for cross-examination.

Similarly, here, Dr. Chaubey offered opinions during his deposition that are not contained within any of his previous publications. *See* Motion, p. 1-3, 22. Although those opinions may be based upon or derived from pre-litigation research and study, Plaintiffs fail to specifically identify the previous publications in which many of the opinions offered by Dr. Chaubey during his deposition may be located. The portions of Dr. Chaubey's deposition that Plaintiffs cite in support of their position simply say that Dr. Chaubey has not been paid by either side to testify in this case, that Plaintiffs have not requested that Dr. Chaubey arrive at any opinion specially for the purpose of this case, and that Dr. Chaubey has no knowledge of the specific facts of this case. *See* Resp., p. 11. Without specific identification of the publications in which Dr. Chaubey

previously disclosed the challenged opinions, this Court and Defendants are left to conclude that the opinions must not actually be included in any of Dr. Chaubey's prior publications. This is especially so given Dr. Chaubey's close relationship with Plaintiffs' expert Dr. Engel and Plaintiffs' counsel.

Because many of Dr. Chaubey's opinions were first expressed during his deposition, Defendants had no opportunity to prepare to cross-examine Dr. Chaubey with respect to those opinions prior to learning of them. Under *Griffith*, this is inequitable and the exact situation that Rule 26(a)(2)(B) is designed to prevent. The Court should preclude any opinions offered by Dr. Chaubey in this litigation that are not contained in his previously published works.

F. The Opinion Testimony Offered by Plaintiffs' Non-Retained Experts Is Cumulative[5]

Plaintiffs assert that Mr. Derichsweiler's opinion testimony is not cumulative and base this position first on the notion that Plaintiffs might call Mr. Derichsweiler to testify before Drs. Storm and Engel.[6] Resp., p. 23-24. In that instance, the testimony of Mr. Derichsweiler would not be cumulative; instead, the testimony of Dr. Storm and/or Dr. Engel would be cumulative.[7]

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[5] Although Defendants' challenge to opinion testimony as cumulative under Federal Rule of Evidence 403 focused on testimony offered by Mr. Derichsweiler, Defendants also contended that the testimony of Drs. Chaubey, Haggard, and Daniel will be duplicative of opinions offered by Plaintiffs' retained experts and barred under Rule 403 if that testimony is found to be based on data connected to this case. Motion, p. 24, n. 8. Plaintiffs do not respond to this challenge.

[6] In their Motion, Defendants also assert that Mr. Derichsweiler's opinion testimony will be duplicative of opinions offered by Plaintiffs' retained experts Drs. Cooke, Welch, and Teaf. Motion, p. 24. Plaintiffs do not address this challenge in its Response.

[7] It is hard to imagine that Plaintiffs would foreclose their opportunity to present either Dr. Engel's or Dr. Storm's work and opinions to the jury given the substantial expense incurred for Dr. Engel's modeling work. Like Dr. Engel, Dr. Storm has actually performed research and study in the IRW; whereas, Mr. Derichsweiler's opinions are simply based upon his review of Dr. Storm's and Dr. Engel's research and study. For Plaintiffs to suggest that they might knowingly choose to make Dr. Engel's and Dr. Storm's testimony cumulative is difficult to accept. Nonetheless, Plaintiffs have conceded that if they call Mr. Derichsweiler first, their retained experts cannot then provide testimony which is cumulative.

Plaintiffs additionally assert that Mr. Derichsweiler brings what it terms a "unique perspective" to this case that would not be cumulative of any other witness. These arguments are ineffective and provide no basis for the Court to deny Defendants' Motion as it relates to Mr. Derichsweiler.

With respect to the "unique perspective" that Mr. Derichsweiler will allegedly bring to this case, Plaintiffs contend that he has access to water quality data collected in the IRW through his position with the Oklahoma Department of Environmental Quality ("ODEQ") and more specifically through his work in identifying "impaired waters" of the State. Resp., p. 24. To the extent that Mr. Derichsweiler will offer opinions based upon his work in these or other areas that do not overlap with research and studies conducted by Drs. Storm or Engel, Defendants do not challenge those opinions as being cumulative. However, the fact that Mr. Derichsweiler has a unique perspective does not change the fact that he has already acknowledged that many of his opinions are either based upon the work of Dr. Storm or Plaintiffs' retained experts or are actually duplicative of opinions that will be offered by others during the trial of this matter. Plaintiffs offer no valid reason for this Court to not preclude such opinions under Federal Rule of Evidence 403.

WHEREFORE, Defendants Tyson Foods, Inc., Tyson Chicken, Inc., Tyson Poultry, Inc., Cobb-Vantress, Inc., Peterson Farms, Inc., George's, Inc., George's Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, Simmons Foods, Inc., Cal-Maine Foods, Inc., and Cal-Maine Farms, Inc., respectfully ask the Court to grant their Motion in Limine to Preclude Opinion Testimony by Non-Retained Experts.

Respectfully submitted,

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I certify that on the 28th day of August, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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